

# The Proposed Kenosha Casino

Submitted by  
Secretary Mike Huebsch  
Wisconsin Department of Administration

January 22, 2015

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# Introduction

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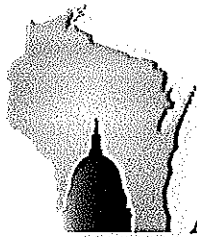
After taking more than nine years to review the proposal, on August 23, 2013, the Federal Bureau of Indian Affairs (BIA) approved the Menominee Indian Tribe of Wisconsin's (Menominee) application to open an off-reservation casino at the former Dairyland Greyhound Track site in Kenosha. After BIA announced its decision, Governor Scott Walker solicited a sixty-day tribal comment period, after which he tasked the Department of Administration (DOA) with preparing an unbiased, independent financial and economic review of the proposed Kenosha casino. Soon after and based on an interview- and qualification-based process, the State entered into a special counsel contract with the law firm of Dykema Gossett PLLC (Dykema) and economists from Nathan Associates Inc. (Nathan).

Dykema and Nathan assisted the State in conducting an independent analysis of the proposed Kenosha casino. It is important to note that neither of these two firms have ties to any of the parties involved in the project.

The Governor wanted to see if it would be possible to reach a "win-win-win," or in other words a proposal that would ultimately be a win for taxpayers, a win for the tribes that could be negatively impacted by the proposed Kenosha casino, and a win for Menominee.

As outlined in this report, the State worked to achieve a win-win-win in the 18-month review period provided by federal law. Specifically, the State kept open constant lines of communication with interested parties, took input from local and state government officials, and sought the advice of BIA, all while keeping the public informed and releasing extensive amounts of information. The overall scope of work performed included certifying the companies associated with the operation of the proposed Kenosha casino, a review of civil and criminal jurisdiction, an evaluation of land use issues, compiling the data necessary to produce an independent economic and fiscal report, outlining the potential litigation risks, and following the processes laid out in compacts negotiated by Governor Jim Doyle. The State acted in good faith in all of its negotiations, dealings related to the compact amendments, arbitration, and all other actions taken to achieve a win-win-win.

Ultimately, this report outlines the steps taken to complete this review and explains all of the relevant information gathered as a result of this process.



**WISCONSIN DEPARTMENT OF  
ADMINISTRATION**

**SCOTT WALKER**  
GOVERNOR

**MIKE HUEBSCH**  
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January 22, 2015

The Honorable Scott Walker  
Governor of Wisconsin  
State Capitol  
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Dear Governor Walker,

As directed by you on November 11, 2013, we have completed a financial and economic review of the Menominee Tribe of Wisconsin's proposed Kenosha casino.

Before getting into the details of the economic and fiscal report it is important to understand that a win-win-win scenario is not possible. The U.S. Bureau of Indian Affairs (BIA) indicated they will not approve a compact amendment that satisfies the Forest County Potawatomi Community (FCPC). Additionally, even though we were able to reach a negotiated settlement with the Ho-Chunk, they remain steadfastly opposed to moving forward with the Kenosha project. It has become apparent through this process there is no action that you, I, or any agent of your administration can take to make all interested parties support the proposed Kenosha casino.

In our report, I have not included a recommendation to approve or reject the proposed Kenosha casino and instead have focused on providing you with a report that allows you to make a fully informed decision that is in the best interest of all Wisconsin taxpayers. Specifically, this report contains detailed data on the proposed Kenosha casino, an overview of its potential economic and fiscal benefits, and the risks inherent with concurrence.

The possibility exists that your approval of the proposed Kenosha casino could have a positive economic impact on the Kenosha area and state as a whole. Our report shows, that in an ideal scenario at full build out (2021), the proposed Kenosha casino could create 3,900 net new jobs, increase overall wages by \$192 million across the state, and spur \$601 million in economic output.

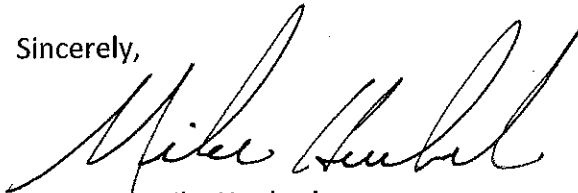
Although the Kenosha casino could result in these positive economic benefits, approval also comes with substantial and significant risks. Our analysis shows taxpayers could lose out on hundreds of millions of dollars of tribal revenue sharing payments as a result of the compacts

negotiated by Governor Jim Doyle. Due to the legal exposure created by the Doyle compacts, beyond just losing future revenue, approving the Kenosha casino could require taxpayers to pay FCPC hundreds of millions of dollars in refunds of previous payments made to the State. If the Kenosha casino is approved, there are a number of other issues that should be considered:

- the impact of possible expanded gaming in northern Illinois;
- the Menominee's use of more than 220 acres that would likely be put into trust;
- the cost of litigation;
- the consequences of a delayed casino opening;
- the immediate and long-term impact on our state budget and consequently Wisconsin taxpayers; and,
- the cost of indemnifying FCPC.

As you know, you have until February 19, 2015, to make a decision on the proposed Kenosha casino. You have the very difficult task of evaluating the risks and weighing them against the potential positive economic benefits. This report contains the data available for you to make a fully informed decision that is in the best interest of all Wisconsin taxpayers.

Sincerely,

A handwritten signature in black ink, appearing to read "Mike Huebsch", written in a cursive style.

Secretary Mike Huebsch  
Wisconsin Department of Administration

## **Background Information**

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On November 11, 2013, Governor Walker tasked DOA with having extensive discussions with the tribal governments and finding a win-win-win. Soon after, the State assembled a core casino team consisting of the DOA Secretary, DOA Assistant Deputy Secretary, the Agency Communications Liaison, and members from DOA's legal division. Along the way, special counsel was retained consisting of the Dykema law firm and economists from Nathan. These two firms have no ties to any of the parties involved in the project.

The team focused on gathering objective, unbiased information. This section briefly outlines some of the important components that went into producing this report.

### **Communication with the Tribes**

Since being tasked with completing an independent financial and economic review of the proposed Kenosha casino, DOA, special counsel, and interested parties have communicated extensively. Throughout the entire process there have been constant lines of communication open between the State and FCPC, Ho-Chunk, and Menominee.

Since August of 2013, Secretary Huebsch had numerous phone calls and at least:

- 14 in-person meetings with FCPC officials;
- 3 in-person meetings with Ho-Chunk officials; and
- 15 in-person meetings with Menominee & Hard Rock officials.

Additionally, members of the State's team have separately communicated hundreds of times with impacted parties. The team of economists with Nathan had multiple in person meetings, and extensive follow-up communication with the interested tribes.

As a result of these extensive communications, the State received extremely detailed information from interested tribes and parties, which is discussed in the methodology of the reports.

### **State Legislative and Local Government Involvement**

Throughout the process, DOA monitored news articles and responded directly to inquiries from state legislators and local government officials.

State legislators and local elected officials were provided updates on the evaluation process. Input, concerns, and issues brought about by these conversations were evaluated and balanced against the need to produce a truly independent, unbiased fiscal and economic report. When

appropriate, input from state legislators and local officials was incorporated into this analysis in an effort to produce the most accurate and comprehensive report possible.

Many pieces of information gathered from state legislators and local elected officials were evaluated. Notably, the entire team visited the proposed Kenosha casino site on February 26, 2014. There was an extensive, in-depth discussion with the Mayor of Kenosha, the Kenosha County Executive, current owners of the facility, representatives from the Kenosha Area Convention and Visitors Bureau and a representative from the Kenosha Area Business Association. Several topics were discussed at this meeting, and ultimately incorporated into this analysis, including information about agreements between local governments and Menominee, information on the proposed casino's phasing and build-out, and an understanding of how the proposal would work with the existing facilities.

### **Meetings with BIA**

DOA had two in-person meetings with BIA and at least three separate substantive conference calls. During these meetings and calls, a potential compact amendment with the Menominee, involvement of the Seminole Tribe, competition between tribal casinos, FCPC indemnification, the possibility of land use controls, and a number of other issues were discussed.

The goal of these meetings and calls with BIA was to ensure that Wisconsin taxpayers would be protected if the Kenosha casino was approved. As a result of these meetings, the State received a greater understanding of both federal processes and the framework BIA would use to consider potential compact amendments.

### **Release of Information**

Throughout the evaluation process, many members of the media and interested tribal parties made requests for information. Not only did the State receive numerous open records requests, but DOA also received a plethora of other less formal inquiries from the tribes and members of the media.

In the interest of open and transparent government, throughout the evaluation process, DOA processed and released many open records requests related to the Kenosha casino, which contained a total of 13,679 pages.

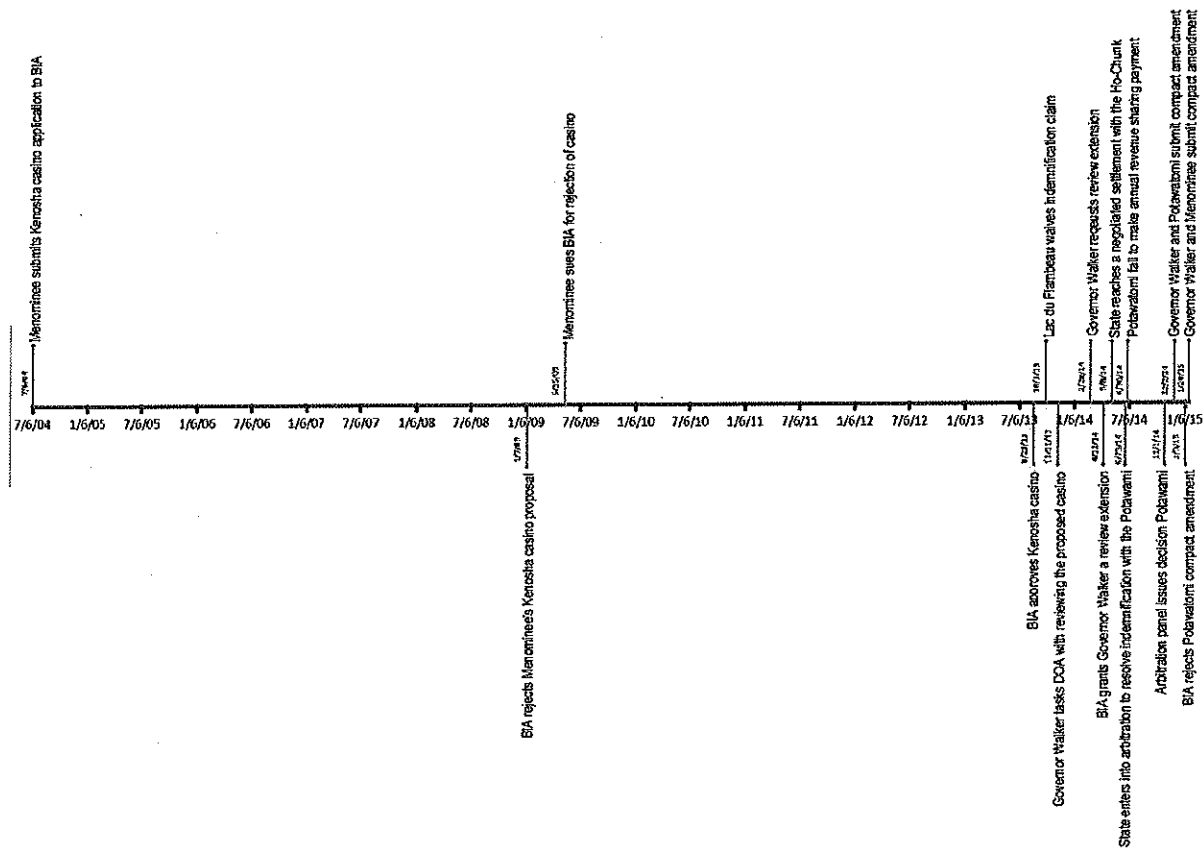
Because this project heavily involved documents produced by various tribes describing in-depth tribal gaming operations and financials, the State was at times limited in what records could be released. All gaming compacts have provisions requiring confidentiality of tribal gaming records. Section 10 of the Menominee Indian Tribe of Wisconsin compact is an example of a standard provision found in the compacts:

*The Tribe requires that its gaming records be confidential. The State and the Tribe agree that the State does not otherwise have a right to inspect or copy tribal gaming records. However, in order to enable the State to perform its oversight and enforcement functions and responsibilities under this Compact, the Tribe required that the State pledge, and the State does so pledge, that any tribal records or documents submitted to the State, or of which the State has retained copies in the course of its gaming oversight and enforcement, will not be disclosed to any member of the public except as needed in a judicial proceeding to interpret or enforce the terms of this Compact. In return, the Tribe has granted the State the right to inspect and copy the Tribal records as provided in this Compact.*

These provisions have been in place since the original compacts were entered into in the early 1990's. Regulatory oversight of the tribal gaming industry is accomplished largely through an ability to review relevant records. Because the tribes are sovereign governments, the State has little ability to compel the tribes to provide such information. These provisions enable the State to obtain the information necessary to effectively regulate the tribal gaming industry.

### **Timeline of Milestones**

Since the Menominee submitted their Kenosha Casino Project to BIA on July 6, 2004, there have been a number of important milestones that fed into this analysis. The next page contains a timeline of events that provides context around the data contained in this analysis:



## Executive Briefings

DOA provided three in-depth briefings to Governor Walker since beginning to compile the information explained in this report.

In the first meeting, the Governor was given an overview of the concurrence process and briefed on the relevant provisions and the need for the expertise of special counsel and well-respected, independent economists. Soon after, the State retained Dykema which in turn subsequently retained economists from Nathan.

The second and third briefings provided the Governor with updates on the process and an outline of the next steps. Topics covered during these briefings included the potential need for compact amendments with FCPC and Menominee, an update on the certification process (which is discussed in greater detail later in this report), and the steps necessary to complete the financial and economic analysis.

Beyond these in-person briefings, the Governor also received two written updates on August 26, 2014, and January 20, 2014.

At no point during these in-depth briefings did Governor Walker indicate he was going to approve or reject the proposed Kenosha casino.

During this time, Governor Walker met directly with all tribal leaders together regarding the proposed Kenosha casino. Additionally, the Governor met individually and separately with leadership from FCPC, Ho-Chunk, and Menominee/Hard Rock.

## Ancillary Issues

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This section outlines a number of issues that are worthy of discussion in this report, but did not directly affect the results of the independent fiscal and economic analysis. There are a few non-economic factors contained in this section that are central to making make a fully informed decision on the proposed Kenosha casino.

### Certification Process

As with all companies interested in gaming in Wisconsin, the Department of Administration's Office of Indian Gaming and Regulatory Compliance (OIGRC) must review and certify the appropriate entities. The certification process for each tribe is similar, but the specific process is dependent on which tribe partners with the company.

HR Wisconsin, LLC (HRW) is a newly formed Florida, LLC created by Seminole HR Holdings, LLC and SHRE/SHRI, LLC. HRW holds contracts to both develop and manage the proposed Kenosha casino in conjunction with Menominee. Pursuant to Menominee's compact, HRW applied to the OIGRC for a gaming-related contractor certificate. This was HRW's original application for a certificate. In its application, HRW made comprehensive disclosures regarding its business and financial history as well as the personal, business, and financial history of its owners, officers, directors, key employees, and spouses as required in the application.

OIGRC conducted a due diligence background investigation of HRW's past and current activities and practices, the business and financial associations of HRW and its officers, directors, shareholders and any other individuals OIGRC deemed necessary. OIGRC, with the assistance of the Wisconsin Department of Justice and the Federal Bureau of Investigation, also conducted an investigation into the criminal history of HRW and these individuals and entities.

No significant undisclosed or derogatory information that would potentially compromise HRW's ability to do business or that would call into question the character of its disclosing individuals was found. Neither HRW nor its disclosing individuals were determined to have willfully or knowingly provided materially false information or to have made intentional omissions in the completion of the Application or the supporting Disclosure Forms. All parties complied with requests for additional information during the course of the investigation.

Based on these investigations, OIGRC determined that it was appropriate to grant HRW a certificate. OIGRC's findings were based in part on the unique nature of the management structure of the applicant, specifically removing the authority of the majority owner, the Seminole Tribe of Florida, from exercising control over the management of HRW. In the order granting the certificate, the OIGRC reserves the right to require disclosures by the Seminole Tribe of Florida upon the change of any facts and circumstances and a determination by the OIGRC that such disclosures are necessary to ensure the requirements of Menominee's Compact are met. Upon such a determination, the Seminole Tribe must file the required

disclosure statements within 30 days. Failure to meet the foregoing requirements is grounds for revocation of the Certificate.

Upon receipt of such notices the OIGRC may then determine if the proposed changes require additional disclosures from any affected entities or individuals. For material changes additional background investigations and OIGRC determinations that it is appropriate for HRW to continue to hold a certificate must be made prior to the proposed changes becoming effective.

Given the unique structure of HRW, it is possible that challenges to the certification could result in a delay of opening the proposed Kenosha casino.

### **Civil and Criminal Jurisdiction**

If the Governor concurs in the proposed Kenosha casino and the Menominee Tribe successfully obtains the property in trust, criminal and civil jurisdiction over the property might become a complicated issue dependent on the facts of each situation. Unlike the other tribes in Wisconsin, state law does not automatically extend to all persons on the Menominee reservation. It is unclear if the proposed Kenosha casino site will have the same legal status as Menominee's reservation lands. Therefore it is possible some crimes and civil actions that arise on the proposed Kenosha casino site would not be resolved in the same manner as crimes and civil actions that arise at the other tribes' casinos. This dichotomy currently exists at the casino on the Menominee reservation. But if it extends to the proposed Kenosha casino, the impact could increase due to the scope of activities expected at and around the proposed Kenosha casino.

Indian tribes are sovereign nations that have a unique trust relationship with the federal government. Criminal and civil jurisdiction—the power to define laws and prosecute crimes or adjudicate civil claims—over Indian Country is determined by federal statutory and case law. This body of law divides Indian Country into two different types of tribes, and different standards apply to each type of tribe. Those types of tribes are P.L. 280 tribes and non-P.L. 280 tribes. P.L. 280 tribes are tribes that are subject to Public Law 280 ("P.L. 280"). P.L. 280 is a federal statute that removed federal jurisdiction over criminal and civil matters in Indian Country in six states, granting that jurisdiction to those states. Non-P.L. 280 tribes are tribes that are not located in the six states listed in P.L. 280, and jurisdiction is determined by a separate body of federal statutes and case law.

Wisconsin is one of the states listed in P.L. 280, so jurisdiction over Wisconsin tribes is determined by P.L. 280. However, P.L. 280 does not apply to the Menominee reservation due to the tribe's unique history. As a result, the criminal and civil jurisdiction over the Menominee tribal lands is more complicated, and different, than jurisdiction on the other tribes' lands. While there will still be effective law enforcement at the proposed Kenosha casino, the differing jurisdictions could complicate criminal and civil actions arising out of and at the proposed casino.

Because Menominee is a non-P.L. 280 tribe, different statutes and case law establish what laws Indians and non-Indians must follow and what entity is responsible for enforcing and adjudicating those laws. Jurisdiction is divided among the tribe, the State, and the federal government. Determining what authority has jurisdictional power varies from situation to situation and depends on three factors: the offender, the victim, and the nature of the offense. Thus, each situation must be independently analyzed to determine what law controls and what authority has the power to enforce the controlling law.

While Menominee reservation lands are not covered by P.L. 280, there is an argument that P.L. 280 extends to the proposed Kenosha casino site. Menominee has entered into an intergovernmental agreement asserting that P.L. 280 will apply to the Kenosha site. In the Secretarial determination, BIA appears to have relied on this statement to conclude that Menominee has granted the State (and county and city) jurisdiction over conduct on the proposed Kenosha casino site. However, there is a specific process established by P.L. 280 to allow tribes to cede jurisdiction to states. The Secretary of the Department of the Interior must call a special election, at the request of the tribal council or by 20% of the enrolled adults, and a majority of the adult Indians must vote in favor of the state accepting jurisdiction. 25 U.S.C. § 1326. It is not likely that an intergovernmental agreement is sufficient to bypass the P.L. 280 process and alter the legal analysis. Whether and to what extent State law applies on this site cannot fully be resolved until the issue is addressed by the courts, which could easily occur outside of Menominee's control.

## **Land Use Issues**

As with existing tribal land, if the Kenosha site is taken into trust for the Menominee Tribe, state civil and regulatory laws will no longer directly apply. The applicability of state tax laws to transactions occurring on the site will vary, according to the legal incidence of the tax and the identity of the parties. Zoning and similar codes, state environmental laws and processes, health and safety standards, and other important regulatory controls will be inapplicable.

In response to the natural concerns the change in governing authority presents to the State, the Menominee Tribe agreed in its Compact that certain health and safety codes set forth in Wisconsin law would directly apply to the Kenosha Facility, although they would be enforceable only through the Compact. The Compact, however, defines the Kenosha Facility as the *Class III* gaming facilities and activities, and the Department of Interior takes the position that the Compact cannot govern or regulate non-gaming activities. Thus, even to the limited extent the Menominee Tribe has agreed to apply state law, they have not agreed to do so with respect to retail and hotel developments, or any other business other than the Class III gaming business itself. On a parcel of over 200+ acres, this means much of the land use will not be subject to any state law or control. When questioned about this, The Menominee Tribe responded that it will not enter into an agreement providing State and local control over land not used for the gaming facility itself.

Although the Menominee Tribe entered into an Intergovernmental Agreement with the City and County, that agreement too has similar limitations. It would not apply to retail, restaurant, and entertainment activities, and despite the apparent belief of the local governments to the contrary, it does not in any way limit the Menominee Tribe to the developments they proposed during the Two-Part Determination and environmental review. As a legal matter, once the land is taken into trust, the Menominee Tribe is not limited to the development that was reviewed during the federal environmental process. The land cannot be taken out of trust without Congressional authorization. And BIA informed us during meetings that the amount of land to be taken into trust cannot be reduced from the full site proposed in the Menominee Tribe's application, nor could the State through a Compact amendment obtain any control over non-gaming activities.

### **Federal Fee-to-Trust Process**

Approval of the proposed Kenosha casino does not complete the federal processes necessary for the project to proceed. BIA will need to render a decision on Menominee's application for the federal government to take land in trust under 25 C.F.R. 151. Although the outcome of that decision would appear to be a foregone conclusion, it is in fact a separate decision that requires additional time and the completion of technical steps such as updating both title insurance and a prior environmental contaminant survey.

Historically, once BIA made a fee-to-trust decision, procedures required BIA to publish a notice in the Federal Register, and then wait at least 30 days before actually taking the land into trust. This waiting period was to provide interested parties a window to bring legal challenges to BIA's decision, because the position of the federal government was that once the land was actually taken into trust, the federal Quiet Title Act would bar any such challenges.

Consequently, the normal practice in controversial gaming acquisitions became that opponents would file suit, BIA would stay the actual act of taking the land in trust during the litigation, and although BIA would consistently win challenges, it could take several years before the land finally went into trust.

In 2012, however, the U.S. Supreme Court ruled that the Quiet Title Act did not prevent challenges after the land was already in trust, even if those challenges would result in the land coming out of trust. *Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012). Following the *Patchak* decision, a challenge to a fee-to-trust decision is now subject only to the 6-year statute of limitations period under the federal Administrative Procedures Act. Interior has since amended its regulations to do away with the 30-day waiting period, and can now take the land into trust immediately, letting legal challenges play out after the fact.

In this case, absent a negotiated agreement, there is no doubt at all that FCPC and Ho-Chunk will bring every conceivable legal challenge against BIA. Such challenges will include challenges

to the sufficiency of BIA's analysis in the NEPA (National Environmental Policy Act) review, as well as its weighing of the factors and treatment of interested parties in the two-part decision. While the viability of BIA's decisions cannot be fully assessed at this point, they certainly cannot be dismissed out of hand. Additionally, the State simply cannot predict whether BIA will immediately take the land in trust if faced with credible challenges, or delay that step. Finally, if BIA does take the land in trust, the State cannot accurately predict what effect pending challenges might have on the project's ability to obtain financing. In sum, while the fee-to-trust process could be fairly seamless and of short duration, it could also drag on for significant periods of time, during which time the State's loss from FCPC withholding payments would mount and the economics supporting the project could change (e.g., if Illinois expanded gaming in the interim).

### **National Indian Gaming Commission (NIGC) Contract Review Process**

Besides the two-part determination and fee-to-trust decision, before the Menominee Tribe and Hard Rock Wisconsin can finance, build, and operate a casino, practical realities and the Indian Gaming Regulatory Act (IGRA) dictate that their business agreements must be fully concluded and approved. IGRA prohibits any party other than the tribal owner from having a proprietary interest in the gaming activities, and requires that any agreement that allows a third party to make gaming decisions must contain certain provisions and be approved by the NIGC as a management agreement.

In this case, Hard Rock and Menominee Tribe have entered into two agreements, although there is a reopener in both agreements that permits Hard Rock to terminate the agreements if intertribal mitigation payments cause Menominee's total payments to the State and other tribes to exceed 16% of revenue. (If FCPC prevails in having its "last best offer" compact amendment ordered into effect, the financial projections show in this report show that it is a near certainty this level will be exceeded.)

The Hard Rock/Menominee Development Agreement and Management Agreement have both been submitted to NIGC. They have asked NIGC to provide them with a "declination letter" on the Development Agreement, which is an opinion of the NIGC General Counsel that the Development Agreement does not violate any IGRA principles. That declination letter has not yet been received, and the State does not know at this point whether the Development Agreement will be acceptable. Here, the Menominee/Hard Rock Development Agreement provides for a high level of compensation based on a percentage of gaming revenue, an approach that the NIGC has questioned in the past. Additionally, while Menominee has informed us that the Management Agreement is in NIGC's queue for review, that process can take months to complete, and no estimated end-date has been provided. Here, NIGC will need to approve the unique Hard Rock business structure and approve key individuals. Hard Rock has not, to the State's knowledge, had a management agreement approved by NIGC in the past.

# **Tribal Gaming Compacts**

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Understanding that many years ago the State entered into complex and unique compacts with each tribe that conducts gaming, three tribes were identified—the Ho-Chunk Nation, FCPC, and Lac du Flambeau—that could need to be indemnified, or receive compensation offsetting their losses due to the establishment of a new casino.

## **Lac Du Flambeau**

While these three tribes' compacts have different processes, the Lac Du Flambeau waived their claim in writing on October 1, 2013. That left the State to deal with the indemnification provisions in the Ho-Chunk Nation and FCPC compacts, which were negotiated by Governor Doyle.

## **Ho-Chunk Nation**

The Ho-Chunk Nation compact contains a relatively clear and defined process that addresses the State's obligations. The HCN compact required the State and HCN to determine, through negotiation, the amount that HCN's gaming revenues would decrease because of the proposed Kenosha casino. Pursuant to the compact, the State compensates HCN for such losses by reducing the HCN revenue sharing payment obligation proportionately. If HCN experiences losses greater than their revenue sharing payment obligation, the Governor, and all subsequent Governors, must ask the Legislature for an appropriation to cover such losses. It is likely the Ho-Chunk Nation could be completely relieved of future revenue sharing payments a few years after a fully operational Kenosha casino opens, but it is unlikely that a future legislature would appropriate additional funds. The State or the Ho-Chunk Nation can request to renegotiate payments annually based upon actual casino revenues.

## **Forest County Potawatomi Community**

In 2005, Governor Doyle negotiated an amendment to the FCPC compact that requires the State to enter into arbitration to create a compact amendment that establishes a process to compensate FCPC for its losses. This compact amendment must then be submitted to the federal government.

Specifically, the FCPC compact required the State to enter into arbitration to yield a compact amendment that would address the rights, duties, and obligations of the parties if the Governor approves the proposed Kenosha casino. Extensive work was needed to commence, endure, and ultimately conclude the arbitration required under the Doyle Compact. Ultimately, the State and FCPC completed the arbitration, and the arbitration panel selected an amendment. The arbitrated amendment required the State to make an annual mitigation payment to FCPC, equal to FCPC's lost revenue caused by Menominee competition. Such a

payment would be required for the duration of the FCPC Compact set to expire in 2031. Although the arbitrated amendment provided that payment by Menominee to FCPC would satisfy the State's obligation, it also provided that the State remained responsible for such payments. Thus, although the State successfully negotiated a compact amendment with Menominee requiring Menominee to pay FCPC the amount of its annual revenue loss, if Menominee were to fail to do so, the State would ultimately be required to make annual payments to FCPC.

Because a compact amendment is only effective if the U.S. Assistant Secretary – Indian Affairs approves the amendment, the State and FCPC submitted the arbitrated amendment to BIA. On January 9, 2015, BIA notified the State that it disapproved the arbitrated FCPC compact amendment.

BIA disapproved the arbitrated FCPC amendment because BIA found it violated the Indian Gaming Regulatory Act (IGRA). BIA based its determination on three elements of the arbitrated FCPC amendment. First, the arbitrated FCPC compact amendment regulated a subject outside the permissible subjects of IGRA. BIA explained that contrary to IGRA, which only allows compacts to regulate subjects directly connected to conduct of Class III gaming activities, the subject matter of the arbitrated amendment was protection of FCPC's revenue stream from losses caused by the proposed Kenosha casino, including Class II gaming, food and beverage, hotel, and entertainment activities.

Second, BIA was concerned that the arbitrated FCPC amendment shifted from the State to Menominee, the obligation to make payments to FCPC without Menominee being a party to that compact amendment.

Third, BIA determined that the arbitrated FCPC compact amendment resulted in Menominee having an obligation to make payments to the State in a manner that violated IGRA. Revenue sharing payments are permissible compact subjects under IGRA only if made in return for "substantial economic benefits to the tribe." BIA found that the arbitrated FCPC compact amendment did not satisfy IGRA's test because the FCPC arbitrated compact amendment simply imposed a financial obligation on Menominee without any concession from the State to Menominee.

BIA's disapproval of the arbitrated FCPC compact amendment left the State with great uncertainty regarding the consequences to the State if the proposed Kenosha casino were to be approved. Without a compact amendment in place with FCPC, the State's obligations to FCPC are unknown. Even though the State believes its duties related to this provision have been discharged, FCPC has challenged this assertion. Additional information on FCPC's challenge is contained in the section titled, "Litigation Risks."

## **Menominee Tribe of Wisconsin**

To enable the State to continue to analyze the proposed Kenosha casino and determine whether a win-win-win scenario was possible, the State and Menominee subsequently negotiated an amendment to the Menominee compact. Recognizing that it is impossible to eliminate all uncertainty absent amendments with both FCPC and Menominee, this amendment attempted to at least reduce the level of uncertainty and risk, provide time and a framework for negotiating a resolution with all affected tribes, and potentially allow the State to move forward with a decision.

In short, the Menominee compact amendment addresses the possibility that FCPC may prevail in one of the legal actions following disapproval of the FCPC arbitrated amendment. In the Menominee Compact Amendment, Menominee agreed to indemnify the State by fulfilling any obligation to make payments that the State may incur if: (1) FCPC prevails in a challenge to BIA's disapproval of the FCPC arbitrated amendment and that amendment is ordered into effect, (2) FCPC prevails in a claim that the FCPC arbitration amendment is already approved and effective, or (3) FCPC and the State return to arbitration and a different compact amendment is selected, presented to BIA, and approved.

The Menominee compact amendment also contains Menominee's agreement to negotiate a future amendment to its compact to effectuate an agreement reached by the State and FCPC, provided such an agreement is itself embodied in an FCPC compact amendment that BIA approves. Because subsequent amendments would have to be submitted to BIA for approval, and BIA has indicated it will not approve full mitigation, this option still does not allow the State to achieve a win-win-win.

# Economics of the Proposed Casino

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This section highlights the potential economic and fiscal impact of the proposed Kenosha casino on different regions and the state as a whole. This section contains data, results, and conclusions from “The Potential Economic & Fiscal Impact of a Proposed Kenosha Casino,” (Economic Study) and “The Potential Market Impact of a Proposed Kenosha Casino,” (Market Study) which Nathan prepared. It is important to note that the data and conclusions drawn in this analysis do not necessarily reflect the risk factors outlined throughout the rest of this report. Plainly put, the jobs and economic data contained below are largely a best case scenario where the potential risk factors do not come into play throughout the duration of the build-out and phasing of the proposed Kenosha casino, with the exception of the generic scenario where Illinois expands prior to Kenosha opening.

## Executive Summary of Results

- Given the proposed Kenosha casino’s size, scope and location of potential customers, the Kenosha location would directly compete in the market areas of existing nearby tribal casinos operated by FCPC and Ho-Chunk;
- At full build-out (2021), the Kenosha casino could produce roughly 3,900 net new jobs in Wisconsin, increase overall wages by \$192 million across the state, and spur \$601 million in economic output;
- The Kenosha casino would cannibalize more than \$100 million in gross gaming revenue during the first stabilized year of operations for the proposed casino (2021); and
- The Kenosha Casino would experience Net Gains in FY 2019, FY 2020, and FY 2021 and experience Net Losses in FY 2016, FY 2017, and FY 2018. In the event of no Illinois expansion, these Net Losses are significant because a portion of the financing for Phase II of the proposed Kenosha casino is supposed to come from gains in the first years of its operation.

If the casino venture succeeded in expanding to the size Menominee intends, the proposed Kenosha casino would have strong, positive economic and fiscal impacts on Kenosha County. Generally speaking, the proposed casino would generate within the county: casino expenditures; casino jobs, wages, and employee spending; the iteration of businesses purchasing from other businesses as a result of casino expenditures and casino employee spending; jobs at indirectly impacted businesses; wages and spending by employees at indirectly impacted businesses; tax revenue on all taxable economic activity; and revenue sharing payments to the City of Kenosha and Kenosha County.

The proposed Kenosha casino would also have a strong, positive impact on Menominee County given that gaming profits would be sent by the proposed casino to the Menominee Tribe, which is located in Menominee County, and revenue sharing payments would be paid to Menominee County. The Menominee Tribe and Menominee County would make government expenditures,

provide jobs, and pay wages. In turn, this would lead to the iteration of purchases by businesses and households, which would result in an overall increase in output, jobs, wages, and taxes within Menominee County.

While the proposed Kenosha casino would have positive economic and fiscal impacts on Kenosha and Menominee counties, it would have negative economic and fiscal impacts on the counties in which existing nearby tribal casinos are located. Furthermore, there would be potential impacts on the counties in which each of the tribes are located.

Given the loss of revenue at Potawatomi Hotel & Casino (22%), there would be negative economic and fiscal impacts in Milwaukee County. The casino's losses would result in reductions in casino expenditures, jobs, wages, and revenue sharing payments to the City of Milwaukee and Milwaukee County. Opposite of the effects in Kenosha County, there would be reductions in casino and government expenditures, which would lead to a reduction in the iteration of purchases by businesses and households, and an overall decrease in output, jobs, wages, and taxes within Menominee County.

The loss of revenue at Potawatomi Hotel & Casino would also ordinarily lead to negative economic and fiscal impacts in Forest County, where FCPC is located. However, at the time the Economic Report was written, it was the State's intention to seek FCPC impacts mitigated. The report therefore assumed that the Menominee Tribe would compensate FCPC for lost tribal government revenue as a result of the proposed Kenosha casino. If that occurs, there would be no economic or fiscal impacts in Forest County. On January 9, 2015, however, BIA notified the state it would not allow compensation to FCPC. Thus, there would in fact be indeterminate, negative impacts in Forest County (see discussion of Methodology).

The loss of revenue at the Ho-Chunk Nation's casinos (16%) would similarly lead to negative economic and fiscal impacts in the counties in which the Ho-Chunk casinos and Ho-Chunk Nation are located. As a result of the Ho-Chunk Nation's gaming compact, the Ho-Chunk Nation would no longer be required to make revenue sharing payments to the State of Wisconsin. Despite the elimination of these payments, there would still be negative impacts in the Ho-Chunk Nation's counties given that reduced casino and government expenditures, jobs, and wages would lead to a reduction in the iteration of purchases by businesses and households, and an overall decrease in output, jobs, wages, and taxes with these counties.

On the whole, the Economic Report showed that the positive impacts of the proposed Kenosha casino in Kenosha and Menominee counties overwhelmingly outweigh the negative impacts in Milwaukee County and the Ho-Chunk Nation counties because the proposed Kenosha casino will create more new economic activity than it will cannibalize from existing nearby tribal casinos. This results in a net positive economic benefit to the State of Wisconsin, despite leaving certain counties worse off.

<b>Figure A</b> <b>Economic Impact of the</b> <b>Proposed Kenosha Casino on Various Locations in 2021</b>			
<b>Location</b>	<b>Output</b>	<b>Jobs</b>	<b>Wages</b>
Kenosha County	\$722,935,312	4,719	\$191,764,220
Menominee County	\$45,583,994	571	\$31,922,914
Milwaukee County	(\$152,644,902)	(842)	(\$45,108,480)
Ho-Chunk Counties	(\$84,980,555)	(632)	(\$30,916,497)
State of Wisconsin	\$601,894,690	3,906	\$192,267,572
Detail may not equate to total due to rounding. Output and Wages in 2014 Dollars. Jobs are measured as full-time equivalents (FTEs).			

Overall, the results of this independent economic analysis show that, for the most part, claims made by each tribe are accurate as far as they relate to themselves. Specifically, the analysis shows Menominee's claim that the casino would create thousands of jobs in the Kenosha area is accurate, and likewise FCPC's claim that there will be substantial job loss in the Milwaukee area is accurate. But, the tribes' respective claims about each other are, for the most part, not accurate. For instance, FCPC's claims that the Kenosha casino would not generate the revenue Menominee predicts are not accurate, and likewise Menominee's claims about the Kenosha casino having only a limited impact on the FCPC's Milwaukee casino are not accurate.

### **Delay of Opening and Illinois Casino Expansion**

A number of scenarios are discussed throughout this report that could delay the opening of the proposed Kenosha casino. Specifically, if any of the following items are delayed, it would likely delay the opening of the proposed Kenosha casino:

- The federal fee-to-trust process;
- The NIGC contract review process;
- FCPC litigating a number of compact related issues;
- A challenge to the State's certification decision;
- FCPC prevailing in court on a number of different challenges; and
- BIA disapproving the January 20, 2015, compact amendment negotiated between the State of Wisconsin and Menominee.

As the Market Study indicates, significant delays in the opening of the proposed Kenosha casino could result in changes in the gaming environment that are not captured by this analysis. A delay could also yield a significant liability for the State in form of missed FCPC revenue sharing payments.

Additionally, the Market Study shows that expansion of casino gaming in Illinois substantially changes the potential size and scope of the proposed Kenosha casino. Ultimately, expanded Illinois gaming would result in a much smaller facility in Kenosha, which would make it more likely that revenue from the facility would not be able to cover indemnification obligations to other tribes and the revenue sharing payments to the State. The possibility of gaming expansion in Illinois remains very real, with Governor Bruce Rauner indicating a willingness to explore that state's gaming policy. Legislators who twice succeeded in passing expansion bills (which were vetoed by Governor Quinn) have announced a renewed initiative to expand gaming. The politics of Illinois gaming make inclusion of a Lake County facility (potentially in very close proximity to Kenosha) almost inevitable.

### **Nathan & Associates' Methodology**

During the process of reviewing this proposal, the underlying assumptions as to how revenues would be shared among affected parties (i.e., levels of mitigation and revenue sharing) were constantly evolving. Accordingly, the assumptions used for the November 2014 Economic Study were different than those used in the final Market Study. The differences, though, involved monies that would flow for governmental uses. In Economic Study, it was assumed that the Menominee Tribe would make payments to fully indemnify FCPC for their losses, a concept that was firmly rejected by BIA on January 9. The final Market Study assumed approval of a Menominee compact amendment that would not provide for mitigation, but instead hold the State harmless for losses, essentially taking the money that would have flowed to FCPC and splitting it among the State and Menominee. In this scenario, the jobs and impact analysis should not change materially for Kenosha County, Milwaukee County, or the Ho-Chunk counties. Menominee County, though, would benefit from an additional \$40 million being spent by the Menominee Tribe and the State would receive an additional \$25 million. But Forest County would see the loss of \$65 million and the attendant negative economic impact.

#### *Market Impact of a Proposed Kenosha Casino*

The market and impact analyses in this report are based on well-established demand analysis techniques that are commonly utilized for forecasting visits and revenues at casinos in the United States. The analysis and conclusions are derived from a custom designed gravity model that incorporates public secondary data sources for population (U.S. Census), disposable personal income (U.S. Bureau of Economic Analysis), and drive times between different locations (MS MapPoint). It also incorporates confidential inputs that include data from the audited financial statements of Wisconsin's tribal casinos (Wisconsin Division of Gaming), current device and table game inventories (Wisconsin Office of Gaming and Regulatory Compliance), and players club data from Potawatomi Hotel & Casino in Wisconsin and Ho-Chunk Gaming.

A Master Database was constructed consisting of 4,624 communities in Wisconsin, Illinois, Indiana, and Michigan to analyze the gaming market area for the proposed Kenosha casino and its potential displacement impact on existing gaming facilities. The Master Database includes

data by town and city on total population, the adult population (age 21+), per capita income, total income, disposable personal income (DPI), and drive times to each gaming facility in the four states included in the database. Drive times are based on geo-codes for the actual address of each gaming facility. The initial Master Database contains 402,288 discrete data points. The database was expanded to 510,750 discrete data points to evaluate the potential impact of expanded gaming in Illinois on the proposed Kenosha casino.

### *The Potential Economic & Fiscal Impact of a Proposed Kenosha Casino*

In order to estimate the potential economic and fiscal impacts of the proposed Kenosha casino on local and state economies of Wisconsin, Nathan conducted input-output analyses. Employing the IMPLAN economic modeling system, a widely accepted and frequently used economic modeling system, Nathan estimated the total economic impact of the operation of the proposed Kenosha casino, including both the direct and secondary effects. The direct effect is equal to total patron expenditures while visiting the proposed Kenosha casino. Secondary effects come about as patron expenditures are subsequently spent and re-spent by businesses and households throughout the economy. The successive rounds of spending are often referred to as the "multiplier effect." The secondary effects continue until leakages (e.g., imports from outside the study area, profit, and savings) stop the cycle. Nathan quantified the economic and fiscal impacts using several key metrics: output (i.e., value of sales); jobs measured in full-time equivalents (FTEs); wages, including tips and benefits; taxes; and direct payments by tribes to local and state governments.

In conducting the input-output analyses noted above, Nathan excluded from the secondary effects any payments or transfers made by the impacted casinos to entities outside the relevant study area (i.e., leakages from the economy). In the case of the proposed Kenosha casino, these leakages from the Kenosha County model included: transfers of casino profits from the proposed Kenosha casino to the Menominee Tribe located in Menominee County; casino management and development fees paid to Hard Rock, which is headquartered in Florida and owned by the Seminole Tribe of Florida; financing payments, which are likely to be made to lenders headquartered outside Wisconsin; revenue sharing payments to nontribal governments outside of Kenosha County; and mitigation payments by the Menominee Tribe to other tribes negatively impacted by the proposed Kenosha casino.

## Litigation Risks

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FCPC has filed or will file several lawsuits that could have significant consequences to the State if Menominee's proposed Kenosha casino is approved. While the specific relief sought by FCPC varies depending on the specific legal challenge, the exposure to the State remains the same. Overall, in each of the scenarios below, the potential exists for the State to lose hundreds of millions of dollars if FCPC successfully challenges approval of the proposed Kenosha casino (as noted in other report sections). Although the State has strong defenses to these and other challenges that may arise, as with any litigation, it is impossible to be certain with regard to the ultimate outcome. Additionally, any separate challenge to federal approvals for Menominee could delay Menominee's ability to open a casino in Kenosha, thereby negatively impacting the casino's profitability and reducing Menominee's ability to cover any loss to the State, while simultaneously increasing the total lost revenue sharing payments for Potawatomi.

Below are the legal challenges that have already arisen:

- FCPC is challenging BIA's rejection of the arbitrated amendment to their compact in federal court. Although the State is not a defendant in this litigation, if FCPC wins this challenge, the arbitrated amendment could be ordered into effect, requiring the State to be ultimately responsible for the indemnification of FCPC losses. The timeline for concluding this litigation is approximately 12-24 months.
- FCPC claims the arbitrated FCPC compact amendment went into effect when selected by the arbitration panel. FCPC asserts that BIA preapproved the arbitrated amendment when BIA deemed approved the 2005 amendment which established the amendment arbitration process. Although not a strong argument, if the proposed Kenosha casino is approved and a court subsequently agrees with FCPC's argument, the State would be obligated to compensate FCPC for any losses due to the Kenosha casino.
- FCPC is also arguing that their compact requires a compact amendment to be in effect before the proposed Kenosha casino can be approved. Although inconsistent with the FCPC compact's plain language and FCPC's previous statements, it appears likely that FCPC would use this argument to attempt to enjoin Governor Walker from concurring.
- FCPC has challenged its obligation to make revenue sharing payments to the State by withholding its 2014 revenue sharing payment, alleging that the revenue sharing payment is an illegal tax that violates IGRA. FCPC is asserting that the 2003 and 2005 Doyle compact amendments provided FCPC exclusivity from competition within 50 miles of its Milwaukee facility, through a mechanism to be determined through arbitration, in return for lump sum and revenue sharing payments. Because BIA has rejected the arbitrated amendment, FCPC claims that they have not received the benefit they bargained for, and thus the payments made to the State are an illegal tax. The State has argued that FCPC has received the benefit of meaningful exclusivity from expansion of tribal commercial and state-sponsored gaming. The State does not believe FCPC will prevail on this claim. However, if this challenge is successful, FCPC would not make

future revenue sharing payments and the State could be compelled to refund all past lump sum and revenue sharing payments made by FCPC since 2005. That being said, if FCPC were to prevail in such a claim, the FCPC compact might revert to the 1998 version, reducing the number of slots the FCPC may offer from their current number of 3,100 slot machines to 1,000, and their compact would expire in 2019 instead of in 2031.

The amendment to the Menominee compact that the State and Menominee submitted to BIA recently does not fully remove these risks. The amendment only requires the Menominee to compensate the State for any future funds it is required to pay to the FCPC. It does not compensate the State if the State has to refund past payments made by the FCPC. If the FCPC are successful in their litigation against the State, the State may be required to refund FCPC hundreds of millions of dollars that will not be offset by payments to the State by the Menominee.

Complicating matters, in light of BIA's recent handling of the FCPC compact amendment, it is unclear if BIA will approve this new Menominee amendment. Even if BIA approves that amendment, a court could declare the Menominee obligation to compensate the State for any losses to FCPC inconsistent with IGRA and unenforceable. Accordingly, there remains a real risk that despite reaching an agreement with Menominee, the State could still be obligated to cover FCPC's losses resulting from the proposed Kenosha casino or lose FCPC's future revenue sharing payments and be required to refund past payments made by FCPC.

The State would vigorously defend itself against all of these challenges and would likely prevail on any such claims. But the bottom line is that, even if the State ultimately defeats FCPC's challenges, the separate litigation challenging the federal approvals could delay Menominee's ability to open the proposed Kenosha casino. Such a delay would likely negatively impact the casino's profitability and at least delay the State's receipt of any funds from Menominee. Ultimately, these potential legal challenges may decrease the Menominee's ability to cover any financial obligation the State owes to the other tribes, regardless of what legal obligations Menominee has to the State under its compact.

Finally, FCPC could continue or bring new legal disputes over whether it must pay revenue sharing even in the event of non-concurrence. However, it would be much more difficult for FCPC to prevail. Additionally, the State can undercut, even if not legally binding, FCPC's arguments by obtaining an agreement with FCPC that the State's duties to arbitrate a compact amendment have been fully discharged only with respect to this specific Kenosha determination, acknowledging that the Paragraph 11 of FCPC's compact remains intact and enforceable with respect to any future two-part determinations.

# Appendices

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The Potential Economic & Fiscal Impacts of a Proposed Kenosha Casino  
The Potential Market Impact of a Proposed Kenosha Casino